IN THE HIGH COURT OF BOMBAY AT GOA

SECOND APPEAL NO. 145 OF 2005

Mrs. Maria Leta Das
Dores De Mendonca
Clemente, Major,
married, housewife,
r/o Baga and presently
at Panaji. ... Appellant

versus

1. Shri Suresh Vishnudas
   Borkar, Son of Vishnudas
   Raghoba Borkar, Major,
   both resident of Kharebhat,
   Chorao, Goa.

2. Shri Pratap Vishnudas
   Borkar, Son of Vishnudas
   Raghoba Borkar, Major,
   both resident of Kharebhat,
   Chorao, Goa.

3. Shri Ranganath Narayan
   Borkar, Major, Married,
   Resident of Kharebhat,
   Chorao, Goa.

4. Shri Rohidas Narayan Borkar,
   major, son of Narayan
   Raghoba Borkar, resident of
   Kharebhat, Chorao, Goa.

5. Shri Sadanand Narayan Borkar,
   major, son of Narayan Raghoba
   Borkar, resident of Kharebhat,
   Chorao Goa.

6. Shri Tukaram Narayan
Borkar, major, son of
Narayan Raghoba Borkar,
resident of Kharebhat,
Chorao, Goa.

7. Shri Mohan Bhagwant
Borkar, son of Bhagwant
Raghoba Borkar, resident
of Kharebhat, Chorao, Goa.

8. Shri Dhana Bhagwant Borkar,
son of Bhagwant Raghoba
Borkar, resident of Kharebhat,
Chorao, Goa.

9. Shri Maria Celestial Clementa,
major, resident of Kamat Complex,
Building no.10, UG Flat no.4
Tonca, Caranzalem, Goa. ... Respondents

Mr. V. A. Lawande, Advocate for the Appellant.

Mrs. A. A. Agni, Advocate for the Respondent Nos.1 to 3 and 6 to 8.

CORAM : N. A. BRITTO, J.

DATE :16TH JUNE, 2006.

J U D G M E N T

Heard the learned Counsel Mr. V. A. Lawande and Mrs. A. A. Agni on behalf of the appellant and some of the respondents, respectively.

2. This is plaintiff's second appeal arising from R.C.S. No. 82/99/B/C. The appellant in this second appeal is the plaintiff who had filed the said Civil Suit seeking several declarations and permanent injunction to restrain the defendants from interfering with possession and enjoyment of the suit properties. The said suit was filed in respect of 11 properties situated at different places at St. Bartholomeu at Chorao in Tiswadi Taluka. However, it is now stated on behalf of the plaintiff by her learned Counsel that the properties involved in the suit were 5 in number but surveyed under 11 sub-divisions, as mentioned in para 1 of the plaint. Nevertheless, on behalf of the plaintiff, Mr. Lawande has not been able to make any categorical statement as to which of the said 5 properties claimed by the plaintiff have been surveyed under which of the said 11 survey numbers. The plaintiff went and settled in England along with her spouse in the year 1952 or thereabout and it was the case of the plaintiff that she was in possession of the said properties through her Attorney, one Fr. Eufemiano Miranda. One of the allegations giving rise to the filing of the suit is that when the plaintiff went to the suit property on 26-2-1999 for the purpose of removing parasites/bendul from

the trees, the plaintiff was obstructed in the removal of the same. The plaintiff did not even specify into which of the said five properties or for that matter into which of the said sub-divisions the plaintiff had entered into on that day so as to be obstructed by the defendant/s. The first appellate Court has come to the conclusion that the plaintiff has failed to identify that the properties purchased by the plaintiff vide Sale Deed Exh.PW1/F(16-5-1966) are the properties surveyed under the said survey numbers. Both the Courts below have come to the conclusion that the plaintiff is not in possession of the said properties. The trial Court has particularly referred to the admission of the plaintiff that the defendants are in occupation of the suit properties for more than 60 years to come to the conclusion that the plaintiff is not in possession of the suit properties and the first appellate Court has also referred to the fact that the name of the defendants had appeared in the survey records, in order to come to the said conclusion. In other words, both the Courts below have come to the conclusion that the plaintiff is not in possession of the suit properties and according to the plaintiff's own showing the plaintiff has not been in

possession for about 60 years. This is a concurrent finding of fact rendered by both the Courts below.

3. There is no dispute that the suit properties belonged to Eliza Souza Clemente alias Clementina Fernandes who sold the same by Deed dated 20-1-1966 to Condilac Miranda and who in turn sold them to the plaintiff by Deed dated 16-5-1966. In other words this Sale Deed was executed after the plaintiff settled in England. The plaintiff having not been in possession of the suit properties, the plaintiff was certainly not entitled to the grant of relief of permanent injunction as sought by the plaintiff. Therefore, the question which remains is whether the plaintiff could have been granted the other declaratory reliefs sought by the plaintiff. The plaintiff did not claim any declaration of her own title, inspite of the fact that there was a cloud on her title, the names of Eliza Souza Clementina Fernandes having been entered on survey records and the defendants having filed the tenancy case against Maria Celestial Clemente(Defendant No.9). Reliance has been placed on behalf of the defendants on the case of **Ram Saran and another** v. **Smt. Ganga Devi**(AIR 1972 SC 2685) wherein the Supreme Court held that whether the

defendant was in possession of some of the properties and the plaintiff in his suit did not seek possession of those properties but merely claimed a declaration that the plaintiff is the owner of the suit properties, the suit was not maintainable. Again, in the case of **Vinay Krishna** v. **Keshav Chandra and another**(AIR 1993 SC 957) with reference to Section 34 of the Specific Relief Act, 1963(old Section 42) the Supreme Court held that failure of the plaintiff to claim relief of possession barred the discretion of the Court in granting decree for declaration.

4. In the above view of the matter, there are no substantial questions of law involved in this second appeal. The questions formulated or as sought to be formulated by application dated 7-6-2006 are not substanteial questions of law. As stated, there is no substantial question of law involved in this second appeal and consequently the same is hereby dismissed.

N. A. BRITTO, J.

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